Kyle & Stephen, Inc. *and* **Jerry Mason.** Case 15-CA-7501

December 16, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 27, 1980, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found, and we agree, that Respondent, through its supervisor, Jarratt, did not threaten its employees in violation of Section 8(a)(1) of the Act. The Administrative Law Judge also found, and we agree, that Respondent, through its part owner, Harvey J. Hall, did not interrogate its employees in violation of Section 8(a)(1) of the Act.

The General Counsel excepts to the Administrative Law Judge's failure to find that Respondent violated Section 8(a)(1) of the Act by discharging employees Mason and Campbell for engaging in protected concerted activity. The General Counsel also excepts to the Administrative Law Judge's failure to find that Respondent, by Jarratt and its attorney, Harvey Lee Hall, violated Section 8(a)(1) of the Act by interrogating employees Mason and Campbell about their protected concerted activities. For the reasons set forth below, we find merit in the General Counsel's exceptions.

Respondent is a general contractor in Baton Rouge, Louisiana. None of its employees is represented by any labor organization. State law, however, requires that contractors pay their employees "union scale" whenever the contractor is engaged in work for the State. Respondent, in the past, had been ordered to make restitution to employees for failure to pay them the proper wage on state construction jobs.

Respondent had a contract with the State to do construction work at Louisiana State University (LSU). Two of Respondent's employees, Mason and Campbell, felt they were not being paid the correct wage rate for their work. Mason, on behalf of himself and Campbell, filed a complaint with the State Department of Labor. (Both Mason and Campbell had received restitution for Respondent's substandard wage payments in the past, although there is no evidence that either of them instigated the prior complaint.)

Mason's complaint was that he was a carpenter and as such was entitled to $12.45 per hour rather than the $10 per hour he was being paid by Respondent for his work on the LSU job. Campbell, Mason's helper, joined in the complaint.

On November 28, 1979, Doughty, an investigator for the State Department of Labor, came to the LSU site to interview Mason and Campbell regarding their complaint. After introducing himself to Jarratt, Respondent's supervisor, Doughty spoke with Mason and Campbell. After Doughty left, Jarratt approached Mason and Campbell and asked them what they had told Doughty. They said that they told Doughty their names, job classification, and wage rate. Jarratt told them they would not accomplish anything by their actions. In the early afternoon, Jarratt and Hall, a co-owner of the Company, initiated another discussion with Mason and Campbell.

The discussion primarily concerned Mason's wage rate. Mason contends that he was a carpenter and should, therefore, be paid $12.45 per hour, "union scale" for carpenters. Hall responded that, although Mason was indeed a carpenter, he spent about 40 percent of his time engaged in noncarpentry work. Therefore, Hall computed Mason's pay by averaging the rate paid to carpenters ($12.45 per hour) with the rate paid to laborers ($7.80 per hour). Hall concluded, based on this for-

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Additionally, the General Counsel asserts that the Administrative Law Judge's findings are a result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

The Administrative Law Judge, in fn. 3 of his Decision, discredited the testimony of employee Jerry Mason that Respondent's part owner, Harvey J. Hall, told Mason that he (Mason) would no longer have a job with the Company if he kept "complaining to the Board," based, in part, on the finding that Mason's testimony was uncorroborated by that of employee Harold Campbell. The General Counsel excepted to this finding and we find merit in his exception. Mason's testimony on this matter was corroborated by Campbell who testified that Hall stated, "If you don't quit complaining to the Labor Board, you no longer have a job here." However, since the Administrative Law Judge relied upon other factors in crediting Hall's denial of any statement along these lines over Mason's contradictory testimony, including relative demeanor, and found that Hall for the same reasons should be credited over Campbell, we do not rely on Mason's and Campbell's testimony on this matter in resolving the issue of their alleged unlawful discharge.

mula, that Mason should be paid $10 per hour. Hall continued:

> And Mason protested that he was a carpenter. And I don't recall how many times we went back and forth between, "but this morning you were finishing concrete." "I'm a carpenter." "Yesterday you were putting up a fence," "I'm a carpenter." And finally, when I decided that I wasn't getting anyplace, I said to Mason, "I don't have a job for a man who is just a carpenter, and that wasn't the basis on which you were hired. I don't have a job for you."
>
> He said that was the only basis on which he was willing to work.
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> And I don't recall whether I said, "Well, you are fired," or he said, "Well, I quit," or whether we just turned our backs on each other and just left. I don't remember.

Hall told Campbell (Mason's helper) that there would be no work for him now that Mason was not working. Regarding Campbell's termination, Hall testified, "I suppose that is firing him, yes. I guess that would be a correct way to say it."

The Administrative Law Judge found, and we agree, that Mason and Campbell were engaged in protected concerted activity in pursuing their wage claim under state law. The Administrative Law Judge further found, and we agree, that "employees may present a wage claim to an employer, and the employer may not discharge them for this reason." The Administrative Law Judge concluded, however, that Mason and Campbell were not fired for engaging in these activities. The Administrative Law Judge also found it unnecessary to decide whether Mason and Campbell were fired or quit.[2] Rather, the Administrative Law Judge concluded that Mason was "separated" from his employment because he would not work for less than $12.45 an hour and Campbell was "separated" because, without Mason, there was no work for Campbell.[3]

The discussion between Mason, Campbell, and co-owner Hall was initiated by Hall. Neither Mason nor Campbell affirmatively approached Hall to insist that they be paid a particular wage. Hall sought out Mason and Campbell to explain to them how he arrived at their wage rates. When Hall realized that Mason and Campbell still disagreed with him on the proper wage rate, Hall discharged Mason because, "I don't have a job for a man who is just a carpenter, and that wasn't the basis on which you were hired. I don't have a job for you." Hall admittedly discharged Campbell because he had discharged Mason.

In other words, Hall discharged Mason and Campbell for maintaining the position that was the basis of their complaint to the State Department of Labor, i.e., that they were carpenters and, therefore, should be paid as such. Contrary to the Administrative Law Judge, neither Mason nor Campbell *refused* to do any work unless it was carpentry work. Rather, in response to Hall's questioning, they simply maintained that, regardless of the exact work they were doing at any given moment, they were carpenters by trade and should, therefore, be paid carpenter's wages.[4]

Based on the foregoing, we find that Hall discharged Mason and Campbell for pursuing a wage claim under state law and concertedly adhering to their claim before him. Accordingly, we find that Respondent unlawfully discharged Mason and Campbell in violation of Section 8(a)(1) of the Act.

The Administrative Law Judge dismissed the complaint allegations that Respondent, through Jarratt, violated Section 8(a)(1) of the Act by interrogating and threatening Mason and Campbell regarding their protected concerted activities. Specifically, with respect to the alleged unlawful interrogation, the Administrative Law Judge found Jarratt, a job superintendent, is at best a low-level supervisor in substantially the same level as Mason, that his question was no more than an innocent inquiry among individuals who work together, and that it did not, therefore, rise to the level of unlawful interrogation, citing *Pepsi-Cola Bottling Co. of Los Angeles*.[5] As indicated above, Supervisor Jarrett was not only present, but was introduced to State Department of Labor investigator Doughty when the latter came on the jobsite to interview Mason and Campbell. Not long after the interview, Jarratt asked Mason and Campbell together what

[2] When asked by counsel for the General Counsel if he fired Mason, Harvey J. Hall, co-owner of Kyle and Stephen, Inc., answered: "Under the conditions he was laying down to me, I told him I couldn't have him work for me. I suppose that's telling him he is fired." When asked if he had fired Campbell, Hall answered: "I sent him home until I had a place for him. I suppose that is firing him, yes."

Further, when Mason was asked by counsel for the General Counsel if he had quit his job or had intended to quit his job, Mason answered that he did not quit, nor did he intend to quit, adding, "I done talked to the man at the Labor Board. He said, under their law, they would have to pay me backpay."

[3] In so finding, the Administrative Law Judge relied, in part, upon his conclusion that Respondent was involved in an "unresolvable" dispute with Mason and Campbell. However, contrary to the Administrative Law Judge, the conflict between Respondent and employees Mason and Campbell could be and was being resolved by the State Department of Labor and, in any event, the record is devoid of evidence of any actual "refusal" to work by these employees.

[4] We note that Hall testified that after he told Mason, "I don't have a job for you," Mason replied, "that was the only basis on which he was willing to work." This testimony by Hall is, at best, ambiguous. It is based on Hall's impression of Mason's intent. Further, even if such a statement was made by Mason, it occurred after he had been discharged by Hall.

[5] 211 NLRB 870, 871–872 (1974).

they had told Doughty and then remarked, in effect, that they were not going to accomplish anything by their actions. While we agree with the Administrative Law Judge that Jarratt's latter statement does not amount to a threat, we find merit in the General Counsel's contention that the Administrative Law Judge erred in failing to find that Jarratt unlawfully interrogated Mason and Campbell.

Unlike the situation in *Pepsi-Cola, supra*, the questioning here did not arise during the course of a lengthy informal conversation between two passengers in an automobile away from the employer's facility. To the contrary, Jarratts questioning came directly on the heels of the meeting Mason and Campbell had with State Department of Labor Representative Doughty and occurred at Respondent's facility. Jarratt, having been introduced to Doughty, was clearly aware of Doughty's identity when he asked Mason and Campbell "what they told the man," and then informed them that they were not going to accomplish anything by their actions. In these circumstances, this inquiry was directly addressed to their protected concerted activity under the Act. Further, even if the proximity of Jarratt and Mason in Respondent's administrative hierarchy lessened the significance of Jarratt's inquiry *vis-a-vis* Mason, as found by the Administrative Law Judge, this reasoning falls short as to Campbell who was only a helper. Accordingly, since Jarratt interrogated Mason and Campbell regarding their protected activity, we find that Respondent violated Section 8(a)(1) of the Act.[6]

The Administrative Law Judge also dismissed the allegation that Respondent, by its attorney, Harvey Lee Hall, violated Section 8(a)(1) of the Act by interrogating Campbell. In preparation for the hearing, attorney Hall asked Campbell if he knew if Mason had been fired or quit. Campbell replied that the Labor Board attorney told him he was not required to talk with anyone. Hall did not inform Campbell that any statements he (Campbell) made would be voluntary and that no reprisals would be taken against him if he refused to answer the questions. The Administrative Law Judge found that, although Hall failed to comport with the criteria set forth in *Johnnie's Poultry Co., and John Bishop Poultry Co., Successor*, 146 NLRB 770 (1964), such failure was inadvertent and was not an attempt to circumvent the *Johnnie's Poultry* standards. The Administrative Law Judge further found the attempted questioning "isolated, inconsequential . . . and of no impact on the principal allegations of the complaint." The General Counsel excepts to the Administrative Law Judge's failure to find that attorney Hall interrogated Campbell in violation of Section 8(a)(1) of the Act. We find merit in the General Counsel's exception.

Johnnie's Poultry requires that, when an employer has legitimate cause to inquire into matters concerning an employee's Section 7 rights, such as in preparing the employer's defense in an unfair labor practice proceeding, the employer must follow specific guidelines in questioning the employee to avoid incurring 8(a)(1) liability. Among other requirements, an employer must tell the employee the purpose of the questions, assure the employee freedom from reprisal, and secure the employee's voluntary participation. These safeguards are designed to minimize the coercive impact of employer interrogation and, contrary to the Administrative Law Judge's suggestions, are applicable irrespective of the employer's intent to coerce, the extent of the questioning or number of employees so interrogated, or the remoteness of the interrogation to the alleged unlawful conduct. Since Harvey Lee Hall did not adhere to the required guidelines in questioning Campbell, we find that Respondent interrogated Campbell in violation of Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, we shall order that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. We shall order that it offer Jerry Mason and Harold Campbell immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered by reason of their unlawful discharge by Respondent. Backpay with interest thereon is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[7] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

We shall further order Respondent to cease and desist from interrogating its employees concerning their protected concerted activities.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Re-

[6] See *Synadyne Corp.*, 228 NLRB 664 (1977).

[7] Member Jenkins would compute interest on the backpay due in accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

lations Board hereby orders that the Respondent, Kyle & Stephen, Inc., Baton Rouge, Louisiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because of their protected concerted activities.

(b) Interrogating its employees concerning their protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Jerry Mason and Harold Campbell immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnigs they may have suffered by reason of their unlawful discharge by Respondent in the manner set forth in the section herein entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business in Baton Rouge, Louisiana, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by its representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that copies of said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge or otherwise discriminate against employees because of their protected concerted activities.

WE WILL NOT interrogate employees concerning their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 the National Labor Relations Act, as amended.

WE WILL offer Jerry Mason and Harold Campbell immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jerry Mason and Harold Campbell whole for any loss of earnings they may have suffered by reason of their unlawful discharges, with interest.

KYLE & STEPHEN, INC.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me on March 27, 1980, at Baton Rouge, Louisiana, upon the General Counsel's complaint which alleged generally that on November 28, 1979,[1] the Respondent interrogated, threatened reprisals, and discharged two employees in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. 151, *et seq.* At the hearing, the complaint was amended to allege also that, in preparation for the hearing of thie matter, counsel for the Respondent unlawfully interrogated an employee in violation of Section 8(a)(1) of the Act.

The Respondent generally denied the substantive allegations of the complaint.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following:

[1] All dates are in 1979 unless otherwise indicated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent is a Louisiana corporation engaged in commercial construction with its principal office in Baton Rouge, Louisiana. In connection with its business, the Respondent annually receives directly from points outside the State of Louisiana goods and materials valued in excess of $50,000, and during the 12 months preceding the issuance of the complaint herein received approximately $75,000 in services performed for the United States Army at the Fort Polk Ryan Army Reserve Center in Leesville, Louisiana. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The substance of this matter concerns a dispute between employee Jerry Mason and the Respondent over the wage rate to be paid Mason.

Mason is by trade a carpenter. Indeed, according to the Respondent's vice president (and general field supervisor), Harvey J. Hall, he is an "outstanding" craftsman. Mason began working for the Respondent in about mid-April at a wage rate of $9 per hour. Though the precise time is unclear, in early fall Mason's rate was raised to $10 per hour; however, he felt entitled to $12.45.

The Respondent is a relatively small general contractor whose employees are not represented by any labor organization nor is it a party to any collective-bargaining agreements. However, when the Respondent has contracts with the State of Louisiana then that State's prevailing wage law becomes applicable, the effect of which is to require the Respondent to pay employees "union scale." While application of the prevailing wage law must certainly be more complex than this, the parties agree that such is the effect of the law and such suffices for purposes of this Decision.

In the summer and fall, the Respondent was working on at least two projects for the State of Louisiana both of which involved buildings at Louisiana State University (LSU). It appears that sometime in the summer one or more of the Respondent's employees complained to the State Department of Labor that the Respondent was not paying the prevailing wage. There was an investigation and the Respondent was ordered to make restitution. Thus, for instance, on September 18, Harold Campbell received a check for $39.73 "in full and final satisfaction of all sums due me with respect to a deficiency concerning the payment of prevailing wages on State project No. LDL 5697-alterations to John M. Parker Agriculture Center judging arena for the period 7-13-79 to 9-14-79." Mason testified that he also received such a check. (There is no indication that either Mason or Campbell instigated the complaint.)

In late September Hall called a meeting of all of his employees at the Pitt Restaurant, where they were finishing a job. He told them that the department of labor had checked out one of his jobs at LSU and found him deficient but that he had attempted to learn what was required. He told the employees that the restaurant job was the largest private (e.g., nonprevailing wage) job Respondent had going and it was about to be finished, and thereafter most of the people would be working on prevailing wage jobs. While they might go out on a nonprevailing wage job, most likely further employment would be on prevailing wage jobs and he wanted them to understand what he understood was required by the State's labor board.

For instance, the Respondent employed people as carpenter's helpers, a classification not recognized by the State. Thus, those he felt to be competent carpenters would be paid at the carpenter's wage scale but others, who theretofore had been considered carpenter's helpers, would have to be reclassified as laborers and would be paid accordingly—at a lesser rate. Further, according to Hall's generally credible testimony, it was his understanding that he would have to pay the prevailing wage only for the specific time an employee worked in a particular job classification. But because the Respondent does relatively small jobs, all employees are called upon from time to time to do a variety of job functions throughout the working day. A carpenter who would spend most of his time working as such might nevertheless also put in some time each day as a basic laborer, a cement finisher, an iron worker, etc.

Such was the situation with regard to Jerry Mason. Hall testified that inasmuch as Mason did not spend more than about 60 percent of his working day actually doing carpentry work, with the rest of his time being devoted to tying steel rods, cement finishing, and the like, the Respondent was not required to pay the prevailing wage of $12.45 per hour for each hour Mason was actually on the job. On the other hand, Hall determined that it would be very difficult on each working day to break out precisely the amount of time Mason was engaged in carpentry work as against the time that he was performing other job functions. Thus, Hall told Mason that he felt a flat rate of $10 per hour for Mason would reasonably comply with the prevailing wage requirements.

According to Mason he started on the one LSU project at $9 per hour and in about 2 weeks was raised to $10 per hour, "taking for granted" that he had been put on a salary of $400 per week. This was apparently satisfactory until he was not paid $80 for 1 day he missed work. This is when Mason claims he learned that he was being paid $10 per hour although he should have been making $12.45. Accordingly, he determined in late November to press the matter with the state department of labor and this in turn, inferentially, resulted in an investigation by that department on November 28. (Mason further testified, unconvincingly, that he did only carpenter work, though ultimately admitting that he did other job functions.)

On November 28, following the investigatory interview by the state labor department, Hall came to the jobsite and at that time had a discussion with Mason and Campbell. Present also was Job Superintendent James J. Jarratt. The parties are in general agreement concerning the substance discussed, although the General Counsel's

witnesses contend that Hall interrogated Mason and Campbell concerning the investigation by the labor department and then threatened them.

Principally this discussion concerned the pay of Jerry Mason. In essence, Hall said that in the normal course of Mason's workday he did a variety of things from shoveling, which is laborer's work, to concrete finishing and so on. As Hall testified:

> And, Mason protested that he was a carpenter. And, I don't recall how many times we went back and forth between, "But this morning you were finishing concrete." "I'm a carpenter." "Yesterday you were putting up a fence," "I'm a carpenter."
>
> And, finally when I saw that I wasn't getting any place I said to Mason, "I don't have a job for a man who is just a carpenter, and that wasn't the basis on which you were hired. I don't have a job for you."
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> He said that was the only basis on which he was willing to work.
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> And, I really don't recall whether I said, "Well, you are fired," or he said, "Well, I quit," or whether we just turned our backs on each other and just left I don't remember.

Hall's version of this discussion was substantially corroborated by the General Counsel's witness, Harold Campbell:

> Mr. Hall was addressing—And, when he was talking, it was mostly dealing with the carpenter's salary, most we were going on, and Jerry Mason being a carpenter, it was mostly addressed towards him.
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> Now, he was telling us that when you go on some jobs, you are a carpenter, some minutes you're tying steel and the other, pouring concrete. So, they average them in.
>
> Jerry Mason said, "I'm a carpenter all the time."
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> Mr. Hall said, "Yes, you're a fine carpenter." Then he said to me, "You all do good work."[2]

Even Mason testified that, during this discussion, Hall stated:

> "This is my company, I'm going to run the company the way I want to, I'm going to keep the books the way I want to. The way I figure it, Jerry," he was talking to me, "You don't do carpenter work one hundred percent of the time. Part of the time you tie steel, part of the time you pour concrete, part of the time you wreck forms. The way I break it down, I'm going to pay you twelve forty-five an hour for what time I figure you do carpenter work, seven eighty for the time you are not doing it. The way I figure it, it averages out to ten dollars an hour." He asked me did I agree with that.
>
> I told him, "No. I been a carpenter for almost 15 years and I expect to be paid as a carpenter.[3]

When Mason and Hall came to a parting of the ways over the wages Mason was to be paid, the question then developed concerning the status of Campbell, who was Mason's helper. Hall told Campbell that until he could find another carpenter for Campbell to work with, he had no work for him either. Thus Campbell was off for a time, although the record does not disclose how long.

B. *Analysis and Concluding Findings*

1. The discharges

The General Counsel contends that Mason and Campbell were discharged on November 28 because they had engaged in protected concerted, activity; namely, pursuing a wage claim under state law. While I have no doubt that Mason was engaged in activity protected under the Act,[4] I conclude that he was not discharged for this reason.

Based on the credible testimony, I believe that Mason's employment was terminated because he would not work for less than $12.45 per hour and Hall was unwilling to pay more than $10.

Certainly employees may present a wage claim to an employer, and the employer may not discharge them for this reason.[5] On the other hand the employer does not have to accede to their demands.

I conclude that Hall did not discharge Mason because Mason and Campbell concertedly presented the demand for a wage increase or contacted the state labor department. Rather, I conclude that during the course of Hall's discussion about the prevailing wage matter with Campbell and Mason, Mason categorically stated that he was a carpenter and should be paid carpenter's wages for every hour that he was on the payroll. Hall told him that he had no work for one who was "a carpenter all the time." Whether Mason was discharged or quit in the context of this situation is more a semantic nicety than a matter of substance. The crucial element here is that Mason's employment relationship with the Respondent was terminated because he and the Respondent had an unresolvable dispute concerning his wage rate, Mason holding out for $12.45 an hour for all hours worked while the Respondent contended that he was entitled to an average of $10 an hour.[6]

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[2] The comma and quote marks are misplaced in the transcript, which is hereby corrected as set forth.

[3] Mason went on to testify that Hall said if he did not like the way Hall was running the Company and keeping books and if he kept "complaining to the Labor Board" he no longer had a job with the Company. I discredit this aspect of Mason's testimony finding him to be generally not a reliable witness. Rather, I believe his recall of this, which is seemingly crucial to the theory that he was discharged for having engaged in protected, concerted activity, was for purposes of this litigation. This alleged statement by Hall does not really fit into the generally agreed nature of the discussion between the parties. And, it was not corroborated by Campbell. Beyond that, I found Hall to be a very candid, credible and straightforward witness and he denied any statement along these lines. Based on their relative demeanor, where there is a conflict, I credit Hall over Mason.

[4] See *Self Cycle & Marine Distributor Co., Inc.*, 237 NLRB 75 (1978); *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979).

[5] *Hale Manufacturing Co., Inc.*, 228 NLRB 10 (1977).

[6] It is immaterial whether Hall's determination to pay Mason $10 an hour in fact complied with the State's prevailing wage law.

Campbell's termination (or more precisely his layoff) similarly was not motivated by his having engaged in protected concerted activity. Rather, it was, I conclude, a result of Mason's employment having been terminated and the Respondent not having work for Campbell to do.[7] Campbell was competent only to be a carpenter's helper or laborer, although, according to Hall he was a very willing worker.

No doubt Mason and Campbell engaged in concerted activity protected under the Act when they sought to have the state labor department investigate the Respondent, and no doubt they engaged in protected, concerted activity when they talked to that department's investigator on November 28. Nevertheless, based on the credible testimony of Hall, I conclude that these factors had no bearing on Mason's termination. Hall had previously concluded that Mason should be paid $10 per hour, a matter which Mason protested, as he had a right to do. But when Mason in effect announced that he would not work for less than $12.45 each hour, Hall considered him terminated which was his right.

The General Counsel has suggested that Mason and Campbell should be credited and Hall should be discredited. This I decline to do. Based primarily on their relative demeanor, I found Hall to be an exceptionally candid witness whereas I question the veracity of Mason particularly, and to a lesser extent Campbell.

Secondly, the General Counsel contends that, according to the Respondent's own witness, Hall called his office to have the paychecks for Campbell and Mason made up before noon, whereas the discussion took place after noon. Therefore, argues the General Counsel, Hall must have made up his mind to discharge these employees prior to his conversation with them and therefore it would be appropriate to draw the inference that the reason for the discharge was that the state labor department had been contacted.

While it may be that no employer likes to be investigated by a Government agency, there is no evidence in this record to suggest that the Respondent in general or Hall in particular had any particular animosity towards being investigated by the state labor department or had any concern other than compliance with the prevailing wage law. Secondly, since the events took place several months prior to the hearing in this matter, a time error of a couple hours is not unreasonable. Further while the discussion occurred after lunch, the parties involved could very well have eaten before noon. I therefore do not believe that the fact that one witness testified that Hall called in to have the checks prepared prior to noon is critical in determining the outcome in this matter. Again, even Campbell and Mason corroborated Hall's general testimony with regard to the subject matter of their confrontation, in which there is no indication that Hall had predetermined to terminate either of them.

Finally, the General Counsel contends that because it is an industry practice for one who quits to wait for his paycheck, whereas when one is fired he gets his check that day, Mason and Cmmpbell must have been discharged rather than having quit. Again, the matter of whether they were discharged or quit is of secondary importance. The crucial question is that their employment relationship wae mutually terminated for the reasons noted above. For Hall to make their paychecks available to them on that day, while conceivably relevant, is of insubstantial weight.

Accordingly, I conclude that Mason and Campbell were not terminated because they engaged in concerted activities protected under Section 7 of the Act. Rather, Mason was terminated because he refused to work for the pay the Respondent was willing to pay. Campbell was terminated because following Mason's termination there was no work available for him at that time.

I will therefore recommend that the complaint insofar as it alleges the unlawful discharges of Mason and Campbell be dismissed.

2. The alleged interrogation and threats

According to the undenied testimony of Campbell, when the labor department investigator came to the jobsite on November 28, Jarratt talked to him a few minutes and then told him that Mason was a carpenter and Campbell was his helper. Jarratt left and the investigator began his interviews with Mason and Campbell. Jarratt then returned sometime later, and the three of them ate lunch together. At this time Jarratt undeniably asked Campbell, "What did you tell the man?" Campbell testified that he said, "He asked me my name, classification, how much money I'm making and what do I do." And then Jarratt asked Mason, who told him the same. Jarrett said, "You are not going to accomplish anything."

Contrary to Campbell, who testified that Jarratt was gone, Mason testified that, during the interviews, Jarratt was in the area "pacing back and forth in front of us." Mason testified that after the interviews Jarratt asked what they told the man and then stated, "You know you going to keep on talking to him, you'll get yourself in trouble. All you're going to do is get yourselves in trouble."

While the testimony of Mason was undenied by Jarratt, it is in substantial and material conflict with the testimony of Campbell, which necessitates resolving the credibility conflict between the two General Counsel witnesses.

Based on their relative demeanor, I conclude that Campbell's version is probably more truthful than Mason's. And Mason's recall of this conversation, as with much of his other testimony, is I believe an exaggeration to enhance his case.

I find that, following the state labor department investigation, Jarratt did ask Mason and Campbell what they had told the investigator and then did say something to the effect, "You are not going to accomplish anything." I do not conclude, however, that in this conversation Jarratt either interrogated employees in violation of Section 8(a)(1) of the Act or threatened them.

Jarratt, although the job superintendent, is at best a low-level supervisor on substantially the same level as

[7] To the extent Campbell's version differs from Hall's, I credit Hall again based primarily on their relative demeanor.

Mason.[8] Jarratt's question was, I believe, an innocent inquiry among individuals who work together and does not rise to the level of unlawful interrogation. E.g., *Pepsi-Cola Bottling Co. of Los Angeles*, 211 NLRB 870 (1974).

The statement, "You're not going to accomplish anything," does not imply a threat of reprisal.

Jarratt credibly testified that he, Mason, and Campbell, as well as other employees, had had numerous conversations with regard to the prevailing wage rate. Jarratt testified that it made no difference to him whether Mason or anybody else was making $12.45 an hour or not.

I therefore conclude that Jarratt did not interrogate or make threats on November 28 in violation of Section 8(a)(1).

It is also alleged that, during the November 28 confrontation, Hall interrogated and threatened Mason and Campbell. There is nothing even in the testimony of either Mason or Campbell which would indicate that Hall asked them any questions concerning their activity with regard to talking to the state agency or that he in any way threatened them should they continue to engage in such activity.

I therefore conclude that the allegations with regard to unlawful interrogation and threats set forth in paragraphs 6 and 7 of the complaint should be dismissed.

3. The pretrial interrogation of Harold Campbell

At the hearing, the General Counsel amended the complaint to alleged that on or about March 29, 1980, by attorney Harvey Lee Hall, the Respondent unlawfully interrogated Campbell in violation of Section 8(a)(1) of the Act.

Harvey Lee Hall is an attorney and the son of Harvey J. Hall. In his representation of the Respondent in this matter, he sought to interview employees, and specifically Campbell, concerning the events set forth in the complaint. According to Campbell's undisputed testimony, Hall asked him what had happened to Jerry Mason—whether he had been fired or quit. Campbell told Hall that he had been advised he did not have to talk to anyone and he refused not to talk to Hall. Hall then wrote out and gave to Campbell a statement, which reads in material part:

> As you know, no one with Kyle and Stephen has previously attempted to discuss the events of November 28, 1979 with you.
>
> This will make note of the fact that you have refused to inform Kyle or Stephen or its attorney as to your impression of the events that date and following. Particularly: Whether Jerry Mason was fired, whether you filed any complaint, or even had a complaint, and the nature of your subsequent treatment by Kyle or Stephen.

Campbell further testified that at no time was he advised by Hall that any statements would be voluntary or that he did not have to fear reprisals should he refuse to be interrogated.

The General Counsel contends that the attempted interrogation of Campbell by Hall was violative of Section 8(a)(1) of the Act, citing *Johnnie's Poultry Co. and John Bishop Poultry Co., Successor*, 146 NLRB 770 (1964).

While it does appear that the Respondent's attorney did not specifically comport to the criteria set forth in *Johnnie's Poultry*, it is also clear that Hall's failure in this respect was inadvertent and that there was no attempt on his part to circumvent the Board's *Johnnie's Poultry* standards. Beyond this, the attempted interview was isolated, inconsequential, and occurring when it did, of no impact on the principal allegations of the complaint. There is no evidence that any threats were made or reprisals taken following Campbell's refusal to discuss the matter.

While the failure of counsel to conform to the *Johnnie's Poultry* standards makes a technical violation of Section 8(a)(1), it would not serve the purposes of the Act to issue a remedial order in this respect. Accordingly, I will recommend this allegation be dismissed.

[Recommended Order for dismissal omitted from publication.]

[8] There is evidence in the record to the effect that Mason had sufficient authority set forth in Sec. 2(11) of the Act to conclude he was a supervisor. The Respondent, however, specifically, does not contend that Mason was.